

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001872-MR

MELISSA BANKS

APPELLANT

V. APPEAL FROM BALLARD CIRCUIT COURT
HONORABLE WILLIAM LEWIS SHADOAN, JUDGE
INDICTMENT NO. 02-CR-00056

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

MINTON, JUDGE: Melissa Banks appeals the judgment revoking her probation. Although she raised no objection to the revocation proceedings in the circuit court, she now asserts that the revocation hearing did not comport with the minimum standards of

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

due process. We affirm the judgment, finding no due process violation.

KRS² 533.050(2) states that "[t]he court may not revoke or modify the conditions of a sentence of probation or conditional discharge except after a hearing with defendant represented by counsel and following a written notice of the grounds for revocation or modification." Beyond this statute, there are no specific rules for the conduct of the probation revocation hearing except that the probationer is entitled to the minimum requirements of due process of law in these hearings.³

We know that in a revocation hearing, the probationer is not entitled to the "full panoply of rights" accorded one not yet convicted since the probationer is deprived of only a conditional, as opposed to an absolute, liberty.⁴ Furthermore, revocation hearings do not require proof beyond a reasonable doubt but, merely, proof of an occurrence by a preponderance of the evidence.⁵ And the trial court has broad discretion, "both in respect to initiation of a hearing and the disposition

² Kentucky Revised Statutes.

³ Rasdon v. Commonwealth, 701 S.W.2d 716 (Ky.App. 1986).

⁴ Childers v. Commonwealth, 593 S.W.2d 80, 81 (Ky.App. 1979).

⁵ Rasdon at 719.

thereof.”⁶ The standard of appellate review for probation revocation is whether the trial court abused this discretion.⁷

Following a plea agreement with the Commonwealth, Banks entered a guilty plea to the charges contained in a four-count indictment: no registration plates; no insurance; driving while license is suspended for DUI, second offense; and DUI, third offense. The trial court sentenced her in accordance with the plea bargain, except that the court imposed a maximum sentence of five years on the felony charge of driving while license is suspended for DUI, second offense. At sentencing, the trial court probated Banks. The probation order specified that Banks must “avoid injurious or vicious habits including consumption & possession of alcoholic beverages & unprescribed [sic]drugs” and “[d]efendant waives and consents to search at any time or place by any peace officer or probation officer for drugs, alcohol or contraband & submit to random tests at defendant’s expense.”

A few months after imposing sentence, the trial court issued a bench warrant for Banks’s arrest following reports of positive urine tests indicating that Banks was using cocaine. Banks’s probation officer filed a written report in the record that detailed the nature of Banks’s violations and informed her

⁶ Ridley v. Commonwealth, 287 S.W.2d 156, 158 (Ky. 1956).

⁷ Tiriyung v. Commonwealth, 717 S.W.2d 503, 504 (Ky.App. 1986).

and the trial court of the precise nature of the alleged probation violations. Banks did not contest that she received adequate written notice of the grounds for revocation in advance of the hearing. She appeared in person and represented by counsel at the revocation hearing. At the hearing, the trial judge read from the Special Supervision Report from the Division of Probation and Parole. This report was signed by a probation officer. It stated that Banks had been positive for cocaine use on three separate occasions based upon urine samples taken at the probation office and submitted to a lab for testing.

Banks did not object to the proceedings in the circuit court. But on appeal, she argues that the revocation hearing did not afford her due process because the trial court did not take sworn testimony before making its findings, revoking her probation, and sentencing her to five years' imprisonment.

The minimal due process requirements of a parole revocation hearing were set forth in Morrissey v. Brewer.⁸ These requirements were applied to probation revocation hearings in Gagnon v. Scarpelli.⁹ They are: (1) written notice of the claimed violations of probation; (2) disclosure to the probationer of the evidence against him or her; (3) opportunity to be heard in person and to present witnesses and documentary

⁸ 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

⁹ 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

evidence; (4) the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation; (5) a neutral and detached hearing body; and (6) a written statement by the factfinder as to the evidence relied on and the reasons for revoking parole.¹⁰ Where appropriate, conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence, may be used; and hearsay evidence is admissible at these informal hearings.¹¹

We have reviewed the clerk's record and the videotape of the revocation hearing; and we conclude that the court met the constitutional due process requirements: Banks was provided with a written notice of the violations, she was informed of the evidence against her, and she was given an opportunity at the hearing to speak and produce evidence. There was no due process violation in the failure to call witnesses since hearsay is permitted during probation revocation hearings. Banks had a right and opportunity to challenge the content of the probation officer's report of the three positive tests for cocaine as set forth in the Notice of Preliminary Hearing. Banks was not prevented from obtaining independent blood or urine testing

¹⁰ 93 S.Ct. at 1761-1762.

¹¹ Marshall v. Commonwealth, 638 S.W.2d 288, 289 (Ky.App. 1982).

evidence herself or from presenting witnesses and documentary evidence at the revocation hearing.

We conclude that the trial court did not abuse its discretion in revoking Banks's probation and that the revocation hearing did not abridge Banks's due process rights.

ALL CONCUR.

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